SUPREME COURT U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1524

FOOD DRIVERS, HELPERS AND WAREHOUSEMEN EMPLOYEES PHILADELPHIA AND VICINITY, AND CAMDEN AND VICINITY, NEW JERSEY, LOCAL 500, *et al.*,

Petitioners

v.

FOX TRANSPORT SYSTEM AND FOX WAREHOUSING AND DISTRIBUTING CO.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The unreported order of the District Court for the Eastern District of Pennsylvania is reprinted at Appendix A, *infra*. The judgment Order of the United States Court of Appeals for the Third Circuit, also unreported, is reprinted at Appendix B, *infra*.

JURISDICTION

The judgment of the Third Circuit was entered on March 10, 1975. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Does the *Boys Markets* exception to the Norris-LaGuardia Act authorize an injunction where the conduct sought to be enjoined is in furtherance of a non-arbitrable underlying dispute, and only the right to engage in such activity is claimed to be arbitrable by the party seeking the injunction, and the collective bargaining agreement expressly excepts from the no-strike clause the right to engage in the form of activity which is sought to be enjoined?

STATUTES INVOLVED

This case involves §4 of the Norris-LaGuardia Act, 29 U.S.C. §104, and §301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), which are reprinted at Appendix C.

STATEMENT OF THE CASE

1. The Factual Background

Respondent Fox Transport System is a common carrier, occupying a common site with respondent Fox Warehousing (244).[1] The petitioning Union is an unincorporated labor association, representing approximately 145 employees employed by respondents (33-35). Respondents are members of Motor Transport Labor Relations, Inc., a multi-employer bargaining association, and are bound by a collective bargaining agreement with Local 500 known as the National Master Freight Agreement (N.M.F.A.).

The present litigation arises out of a strike by Local 500 against a second carrier, Guerin Special Motor Freight Lines, Inc. Guerin and Local 500 are parties to a separate collective bargaining agreement (49, 51). When respondent Fox Transport undertook the work that Guerin would have handled, Local 500 picketed respondents because they were handling struck goods (39, 50, 77, 84, 110).

Article 9, Section 2 of the N.M.F.A., entitled "struck goods," provides:

> It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action if any employee refuses to perform any service which his employer undertakes to perform as an ally of an employer or person whose employees are on strike, and which service, but for such strikes, would be performed by the employees of the employer or person on strike (176).

The N.M.F.A. also contains, *inter alia*, a grievance and arbitration procedure and a no-strike clause (170, 178).

---

1. Unless otherwise indicated, all references are to the Appendix filed in the United States Court of Appeals.

2. Proceedings Below

A. *Proceedings in the District Court*

Fox brought this action, seeking injunctive relief, against Local 500 alleging that the struck goods dispute was arbitrable under the terms of the N.M.F.A. (5). Without finding a violation of the no-strike clause, the district court preliminarily issued a *Boys Markets* injunction,[2] finding that the dispute was arbitrable. (App. A, *infra*)

B. *Proceedings in the Court of Appeals*

Local 500, in its appeal to the Circuit, urged that the Norris-LaGuardia Act precludes an injunction where the underlying dispute is with another employer. The N.M. F.A., governing the Union's conduct with respondents, authorized a work stoppage where the employer acted as an ally by handling struck goods. Notwithstanding, the Third Circuit affirmed the lower court (App. B, *infra*).

2. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

REASONS FOR GRANTING THE WRIT

The Decision of the Court Below Is an Unwarranted Extension of This Court's Holding in *Boys Markets*, and Is in Conflict With Prior Decisions of the Third Circuit and Other Courts of Appeal.

In *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) this Court recognized a limited exception to the Norris-LaGuardia Act to permit an injunction against a work stoppage in violation of a no-strike obligation in a collective bargaining agreement. The limited exception was based upon the congressional policy to promote the peaceful settlement of labor disputes through arbitration. The express principles adopted by this Court in *Boys Markets*, requiring a finding that "breaches are occurring and will continue," preclude the issuance of an injunction unless the strike is in breach of a no-strike obligation. 398 U.S. at 254. Where, as here, the underlying dispute is between the Union and a second employer, and the only arbitrable issue is whether the Local is entitled to take action in furtherance of that dispute, the criteria of *Boys Markets* are not met.

The decision of the Third Circuit in this case, while in harmony with its earlier *en banc* decision in *NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Parts and Garage Employees, Local Union 926*, 502 F.2d 321 (1974), *cert. denied*, No. 74-419, is in direct conflict with a prior Third Circuit decision and a decision of the Fifth Circuit. *In Parade Publications, Inc. v. Philadelphia Mailers v. No. 14*, 459 F.2d 369 (1972) and *Amstar Corporation v. Amalgamated Meat Cutters and Butcher Workmen*, 468 F.2d 1372 (1972), the Third and Fifth Circuits, respectively, held that *Boys Markets* did not extend to a situation where the only arbitrable issue was the legality of the strike itself. In short, therefore, the holding below "undermines the vitality of the Norris-LaGuardia Act," contrary to *Boys Markets*, 398 U.S. at 253.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD B. BERGMAN

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Third Floor, Lewis Tower Bldg.
15th and Locust Streets
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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FOX TRANSPORT SYSTEM AND
FOX WAREHOUSING AND DISTRIBUTING CO.

v.

FOOD DRIVERS, HELPERS AND WAREHOUSEMEN
EMPLOYEES PHILADELPHIA AND VICINITY,
AND CAMDEN AND VICINITY, NEW JERSEY,
LOCAL 500; WILLIAM O'FARRELL, VICE-
PRESIDENT

CIVIL ACTION

NO. 74-1542

ORDER

AND NOW, this 19th day of June, 1974, and after a full hearing, having heard the arguments of counsel for the parties, the defendants are restrained from jointly or severally striking, picketing, or engaging in any other form of economic activity against the plaintiff or encourage or direct any others to refuse to work or in any other way violating the collective bargaining agreement between the defendant union and the plaintiffs.

This Order is entered because the testimony indicates that unless the relief is granted, the plaintiffs will sustain irreparable injury. Specifically, it appears that plaintiff Fox Transport, is engaged in the business as a common carrier specializing in the transportation of perishable food stuffs and maintains a terminal at the common site with Fox Warehouse, Inc. and both plaintiffs will suffer substantial losses including the permanent loss of some

customers, and damage which cannot be calculated accurately, if the present strike is permitted to continue.

I find the defendants on the other hand will sustain no substantial damage if the injunction is granted.

This order is being entered also because the Court finds that the work stoppage is over issues which the parties are contractually bound to process through the contractual grievance machinery.

It is entered this day at 5:05 P.M.

All the parties present are charged with notice of this order and we will direct the Marshal to serve a copy.

In addition, the parties are directed to arbitrate.

The $500.00 bond will continue for 24 hours and then plaintiffs shall post a $10,000.00 bond.

BY THE COURT:

/s/ James H. Gorbey
James H. Gorbey, U.S.
District Judge

By /s/ Marguerite L. McCaffrey
Marguerite L. McCaffrey
Deputy Clerk to Judge Gorbey

June 19, 1974

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 74-1857

FOX TRANSPORT SYSTEM AND
FOX WAREHOUSING AND DISTRIBUTING CO.,

v.

FOOD DRIVERS, HELPERS AND WAREHOUSEMEN
EMPLOYEES PHILADELPHIA AND VICINITY,
AND CAMDEN AND VICINITY, NEW JERSEY,
LOCAL 500; WILLIAM O'FARRELL, VICE-
PRESIDENT

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

C.A. NO. 74-1542

Submitted under Third Circuit Rule 12(6)

March 5, 1975

Before: ADAMS, ROSENN and WEIS, *Circuit Judges*

JUDGMENT ORDER

After consideration of all the contentions set forth by appellants, it is

ADJUDGED AND ORDERED that the decision of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT:

/s/ Arlin M. Adams
Circuit Judge

ATTEST:

/s/ Thomas F. Quinn
Thomas F. Quinn
Clerk

Dated: March 10, 1975

APPENDIX C

Statutory Provisions Involved

Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §104 provides:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. §185(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1524

FOOD DRIVERS, HELPERS AND WAREHOUSEMEN EMPLOYEES PHILADELPHIA AND VICINITY, and CAMDEN AND VICINITY, NEW JERSEY, LOCAL 500, and WILLIAM O'FARRELL, Vice President,

Petitioners,

v.

FOX TRANSPORT SYSTEM and FOX WAREHOUSING AND DISTRIBUTION CO.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

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QUESTION PRESENTED.

Whether the underlying dispute in this case was one which the parties were contractually bound to resolve through their grievance procedure rather than by a strike?

STATEMENT OF THE CASE.

Petitioners seek review of a decision of the United States Court of Appeals for the Third Circuit affirming the grant of a preliminary injunction by the United States District Court for the Eastern District of Pennsylvania on June 19, 1974.[1] The injunction terminated a strike in violation of a collective bargaining agreement, and directed the parties to submit the underlying issues to the contractual grievance procedure. The Court's jurisdiction was invoked under Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U. S. C. § 185, and the relief granted was as authorized by this Court in *Boys Markets, Inc. v. Retail Clerks Union Local 770,* 398 U. S. 235 (1970).

Respondents, Fox Transport System and Fox Warehousing and Distributing Co. (hereinafter jointly referred to as "Fox"), occupy a common situs at 8th and Oregon Avenue in Philadelphia (32a, 34a).[2] Fox Transport System is a common carrier specializing in the transportation of perishable food stuffs by motor truck, and employing approximately 125 drivers and platform men who are represented for purposes of collective bargaining by Petitioner, Food Drivers, Helpers & Warehouse Employees, Philadelphia and Vicinity and Camden & Vicinity, New Jersey, Local 500 ("Local 500") (33a). Fox Warehousing and Distributing Co. is a private warehouse specializing in perishable food stuffs, and employs approximately 20 persons who are also represented by Local 500 (34a-35a).

Fox and Local 500 are parties to a collective bargaining agreement for the period July 1, 1973, to March 31,

1. The Order of the District Court and of the Appeals Court appear as Appendix "A" and "B" respectively to the Petition for a Writ of Certiorari.

2. All references are to the Appendix filed in the Appeals Court.

1976, known as the National Master Freight Agreement and Philadelphia, Pennsylvania & Vicinity Local Cartage Supplemental Agreement ("the contract") (Para. 6, 4a, 246a).

The contract includes the following provisions: (1) a no-strike clause (P-1, Art. 44, § 1, 178a);[3] (2) a local and a national grievance procedure for resolving disputes during the life of the Agreement (P-1, Art. 44, 178a-181a, Art. 8, 170a); (3) an expedited grievance procedure for resolving disputes over whether the Employer is handling "struck goods" (P-1, Art. 9, §§ 2 and 5, 176a-177a), and (4) provisions regulating the seniority rights of employees affected by a change in an employer's operation such as the opening or closing of a new branch or facility (P-1, Art. 5, 165a-169a).

For many years, Fox has done business with the Great Atlantic and Pacific Tea Company ("A&P") on a daily basis. This service has included transporting perishable products from suppliers to the A&P warehouse in Florence, New Jersey, and making deliveries to A&P's various retail outlets in the Philadelphia area (39a, 100a-101a, 182a-185a). Although these services occasionally include the transporting of fresh meat, a great deal of A&P's fresh meat in recent years has been transported by Guerin Special Motor Freight ("Guerin"), a contract carrier (49a, 77a).

In performing its contract with A&P, Guerin maintained a terminal adjacent to the A&P warehouse at Florence (49a). Guerin's employees are also represented by Local 500, but are covered under a separate collective bargaining agreement between Local 500 and a group of

3. The no-strike clause reads as follows:

"The Union and the Employers agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise."

employers in the food industry known as the "Food Group Contract". Fox is not a party to the food group contract and Guerin is not a party to the contract covering the Fox employees (51a).

In the Spring of 1974, Guerin notified A&P that it was terminating the transportation contract between them, and vacating the terminal at Florence as of June 28, 1974. A&P then requested Fox to substantially increase the volume of fresh meat which it would transport for A&P beginning July 1, 1974 (84a). As a common carrier (as opposed to a contract carrier such as Guerin), Fox would have no contract with A&P, and further, could not decline goods tendered unless it lacked the capacity to handle them (85a).

As the June 28 deadline for Guerin to cease operations approached, Local 500 took two steps: (1) it struck Guerin at Florence (78a),[4] and (2) it sent Fox a telegram demanding that Fox grant seniority rights to all the former Guerin employees (88a-89a).

At approximately 10:30 A. M. on June 18, 1974, A&P contacted Fox and asked Fox to receive and deliver to various local A&P outlets three truckloads of fresh meat which were due to arrive shortly from the B&B Packing Co. ("B&B") in the mid-west. Fox had the requisite capacity and agreed to A&P's request (39a-40a, 42a, 97a-103a, 182a-242a). The three truckloads were brought to Oregon Avenue by B&B that morning and the product was off-loaded by the B&B employees (111a-114a). Fox was hired and paid by A&P for performing this service. Guerin was not involved (39a, 102a).

At approximately noon on June 18, 1974, without prior warning, Local 500 struck Fox by posting pickets at the entrance to the Oregon Avenue facility. The picket signs

4. The precise nature of the dispute between Local 500 and Guerin is not of record. Presumably, it was related to the pending shutdown.

read: "STRIKE, TEAMSTERS LOCAL 500" (35a-37a, 115a). Local 500's Vice President, William O'Farrell ("O'Farrell") was on the picket line (36a).

When the strike began, the Respondents' Vice President, Frederick Fox, Jr., went out to the picket line and asked O'Farrell the purpose of the strike. During that and subsequent conversations that same day, O'Farrell gave two reasons for the strike: (1) to compel Fox to grant seniority rights to the former Guerin employees (48a), and (2) to prevent Fox from handling what O'Farrell characterized as "struck goods", referring to the three shipments received from B&B which were then at the loading dock (37a-38a).

When the picket line went up, Fox had approximately 70 trucks out on dispatch making deliveries and pick ups. As these trucks returned, most of them loaded with perishable products, the drivers stopped their trucks outside the picket line and joined the strike, resulting in a traffic jam of nearly 70 vehicles backed up on Oregon Avenue (52a-53a). The prospect of massive economic loss increased with each hour that the product remained on the trucks rather than in the warehouse where it could be properly protected (62a-65a).

At no time prior to the strike did Local 500 file a grievance on either the seniority issue or the struck goods issue (44a).

At the hearing on Fox's application for a preliminary injunction against the strike, Local 500 elected to put on no case at all (126a). Frederick Fox, Jr., testified that Fox was prepared to have both the question of the seniority rights of the former Guerin employees and the question of whether the goods being handled at A&P's request by Fox were "struck goods" decided in the grievance procedure (44a-45a, 50a). The Court found that the parties were

contractually bound to resolve those issues in the grievance machinery, and, in granting the preliminary injunction, ordered the parties to do so (244a, 245a).

In compliance with this directive, both issues were submitted through the grievance procedure to the National Grievance Committee. The National Grievance Committee assumed jurisdiction and, on October 30, 1974, over the signatures of Frank E. Fitzsimmons, International President of the Teamsters, and of William McIntyre, the Employer Co-Chairman, both issues were decided adversely to Local 500. A true copy of the Decision on the seniority issue appears in the Supplemental Appendix at S-1, and a true copy of the Decision on the "struck goods" issue appears in the Supplemental Appendix at S-2.

ARGUMENT.

I. The Underlying Dispute in This Case Was One Which the Parties Were Contractually Bound to Resolve Through Their Grievance Procedure Rather Than by a Strike.

A. The Action of the National Grievance Committee in Assuming Jurisdiction Over the Issues and Deciding Them Is Determinative of Their Arbitrability Under This Contract.

The contract covering Fox and Local 500 establishes the National Grievance Committee as the decision-making body of last resort for all disputes involving an interpretation of the contract. The Committee is composed of an equal number of Union and Employer representatives (P-1, Art. 8, 170a). With respect to any issue presented to the Committee, the contract provides as follows:

> ". . . If the National Grievance Committee resolves the dispute by a majority vote of those present and voting, such decision shall be final and binding upon all parties." (171a) [5]

In accordance with the Court's decree, both the question of the seniority rights of the former Guerin employees and the question of whether Fox was handling struck goods were submitted to the National Grievance Committee. The Committee rendered a decision on the merits denying Local 500's claims (S-1, S-2).

While it is true that the submission of these issues to the grievance procedure was ordered by the Court, the Court by no means compelled the National Grievance

5. This type of bi-lateral substitute for third party arbitration is its legal equivalent. *General Drivers v. Riss*, 372 U. S. 517 (1963).

National Grievance Committee

Union Chairman:
Frank E. Fitzsimmons
25 Louisiana Ave., N.W.
Washington, D. C. 20001

Employer Chairman:
William McIntyre
1150 17th Street, N. W.
Washington, D. C. 20036

October 30, 1974

Mr. William M. Brown, Secy-Treas.
Teamsters Local Union 500
1100-28 East Lycoming Street
Philadelphia, Pa. 19124

Mr. Frederick W. Fox, Jr.
Fox Transport System
21 S. 5th Street
Philadelphia, Pa. 19106

N-10-74-E16 Local 500 (Philadelphia) vs Fox Transport System
Referred EC JAC, July, 1974, Case No. C-179-74.
NMFA, Article 5, Section 3.

Gentlemen:

Please be advised that the National Grievance Committee on October 30, 1974, adopted a motion that based on the transcript, the claim of the Union be denied.

Very truly yours,

Frank E. Fitzsimmons
Union Chairman

William McIntyre
Employer Chairman

cc:
J. Trerotola
R. Flynn
J. Hutchinson

National Grievance Committee

Union Chairman:
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25 Louisiana Ave., N.W.
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October 30, 1974

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Fox Transport System
21 S. 5th Street
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Mr. William M. Brown, Secy-Treas.
Teamsters Local Union 500
1100-28 East Lycoming Street
Philadelphia, Pa. 19124

N-7-74-E1 Fox Transport System vs Local 500 (Philadelphia)
Dispute, NMFA, Article 9, Section 2

Gentlemen:

Please be advised that the National Grievance Committee, on October 30, 1974, adopted a motion that based on the Subcommittee's report, the claim of the Union be denied.

Very truly yours,

Frank E. Fitzsimmons
Union Chairman

William McIntyre
Employer Chairman

cc:
J. Trerotola
R. Flynn
Jim Hutchinson

Supplemental Appendix.